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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT LEFORT,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045204

(Super. Ct. No. M11111)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition denied.

Deborah A. Kwast, Public Defender, Frank Ospino, Interim Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Denise Gragg and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

* * *

INTRODUCTION

Robert LeFort is the subject of commitment and recommitment petitions filed pursuant to the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).¹ He filed a plea in abatement in the trial court, seeking dismissal of the SVPA commitment petition on the ground it was not supported by the concurrence of the two evaluators appointed pursuant to section 6601 after our decision in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). His petition for writ of mandamus/prohibition challenges the trial court's order denying his plea in abatement.

Following our decision in *Boysel v. Superior Court* (Mar. 28, 2012, G045202) __ Cal.App.4th __ (*Boysel*), we deny the writ petition without prejudice to renewing the challenge to the SVPA commitment petition based on a consideration of the full reports of all four post-*Ronje* evaluators.

ALLEGATIONS OF THE PETITION AND THE RETURN

In October 2000, the Orange County District Attorney filed a petition for commitment as a sexually violent predator seeking to recommit LeFort as a sexually violent predator under the SVPA. Subsequent recommitment petitions were filed in 2002, 2004, and 2006. No probable cause hearing has been held on any of these petitions.

In November 2006, Judge Kazuharu Makino reviewed the 2006 SVPA recommitment petition (the SVPA Petition) and found it stated sufficient facts which, if true, would constitute probable cause to believe LeFort was likely to engage in sexually

¹ Further code references are to the Welfare and Institutions Code unless otherwise indicated.

violent predatory criminal behavior on his release from prison. As a consequence, Judge Makino ordered LeFort to remain detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the State Department of Mental Health's (DMH) assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje, supra*, 179 Cal.App.4th at p. 515.) In *Ronje, supra*, 179 Cal.App.4th at pages 516-517, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, LeFort filed a motion requesting, among other things, that in light of *Ronje*, the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge Patrick Donahue granted the motion and ordered new evaluations of LeFort, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the DMH reassigned Jeffrey Davis, Ph.D., and Mary Jane Alumbaugh, Ph.D., to evaluate LeFort. In a report dated February 12, 2011, Dr. Davis concluded LeFort continued to meet the criteria for commitment as a sexually violent predator. In a report dated March 16, 2011, Dr. Alumbaugh concluded LeFort no longer met those criteria.

Due to the difference of opinions, the DMH ordered independent evaluations of LeFort to be conducted by Michael Selby, Ph.D., and Laljit Sidhu, Psy.D.

Dr. Selby prepared a report dated March 29, 2011, and Dr. Sidhu prepared a report dated May 17, 2011.

In March 2011, LeFort filed a plea in abatement seeking dismissal of the SVPA Petition based on the post-*Ronje* evaluation reports of Dr. Davis and Dr. Alumbaugh. The reports of Dr. Selby and Dr. Sidhu were not available at that time. The district attorney filed opposition to the plea in abatement.

In April 2011, Judge Richard M. King issued an order denying the pleas in abatement filed by LeFort and nine others. Judge King could not consider Dr. Selby's report and Dr. Sidhu's report because they had not been presented to him. As these reports were not presented to the trial court, we decline to consider their contents and conclusions.

The next month, LeFort filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings.

DISCUSSION

In *Ronje, supra*, 179 Cal.App.4th 509, we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the SVPA. As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In *Boysel, supra*, __ Cal.App.4th __, *Wright v. Superior Court* (Mar. 28, 2012, G045203) __ Cal.App.4th __ (*Wright*), and *Reilly v. Superior Court* (Mar. 28, 2012, G045118) __ Cal.App.4th __ (*Reilly*), we addressed whether, before the probable cause hearing, a person named in an SVPA commitment petition may challenge the petition on the ground of lack of concurring evaluators, by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading. We concluded that *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912-913 (*Ghilotti*) authorizes the use of

a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem LeFort's plea in abatement to have constituted such a nonstatutory pleading.

In *Boysel*, *Wright*, and *Reilly*, we addressed the effect of post-*Ronje* evaluations in different scenarios. In *Boysel*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed pursuant to section 6601, subdivision (e), their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. In *Wright*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators likewise disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator, but there was no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In *Wright* and *Boysel*, we denied the petitions for writ of mandamus/prohibition without prejudice to later renewing the challenge to the SVPA commitment petitions. In *Reilly*, *supra*, __ Cal.App.4th __, the two initial post-*Ronje* evaluators agreed the person named in the SVPA petition no longer met the criteria for commitment as a sexually violent predator, and, therefore, we were compelled by the SVPA to grant the writ petition in that case.

This case is similar to *Boysel*, *supra*, __ Cal.App.4th __, in that the reports of the two post-*Ronje* independent evaluators were not before the court when it denied LeFort's plea in abatement. LeFort's plea in abatement, as the plea in abatement in *Boysel*, was based only on the two initial post-*Ronje* evaluation reports, prepared by Dr. Davis and Dr. Alumbaugh. Based on those two evaluation reports, which were the only reports before it, the trial court did not err by denying LeFort's plea in abatement. As in *Boysel*, our decision to deny LeFort's writ petition is without prejudice to renewing

the challenge to the SVPA Petition in the trial court by motion or pleading pursuant to *Ghilotti*, based on all four post-*Ronje* evaluation reports.

DISPOSITION

The petition for writ of mandate/prohibition is denied and the stay of the trial court proceedings is lifted.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.